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In the Supreme Court of the United States

OCTOBER TERM, 1958

ARNOLD SCHLEICH, ALIAS JOSEPH RING, PETITIONER

v.

JAMES W. BUTTERFIELD, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION AT DETROIT, MICHIGAN

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM ANDERSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys,
Department of Justice,
Washington 25, D. C.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 15) is reported at 252 F. 2d 191. The opinion of the District Court (Pet. 2) is reported at 148 F. Supp. 44.

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1958 (Pet. 15). The petition for a writ of certiorari was filed on April 28, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the alien was properly ordered deported on proof that he was an active member and organizer of youth in the Communist Party for a period of approximately seven years.

2. Whether this Court should reconsider its decisions in *Galvan* v. *Press*, 347 U.S. 522, and *Marcello* v. *Bonds*, 349 U.S. 302.

STATEMENT

Petitioner, a native of Germany, sought judicial review in the United States District Court for the Eastern District of Michigan of an order directing his deportation on the ground that he had been, after entry, a member of the Communist Party. The District Court granted the motion of the government for summary judgment (R. 8, 9-12), and the Court of Appeals affirmed.

1. The evidence as to petitioner's membership in the Communist Party was established by the testimony of two witnesses, Pace and Nowell, who were themselves important Party functionaries active in the Detroit area between the years 1929-1936.

Pace testified that he met petitioner in a Party headquarters in 1931 (TR 19). Petitioner at that time was assigned to organize youth in the Party's Labor Sports Union (TR 20, 21). Pace worked with him in this activity (TR 21), seeing him two or three times a week (TR 46). During that year, Pace saw petitioner at five or six closed District Committee

meetings of the Young Communist League[1] (TR 20). In 1933, Pace was present at a meeting of the District Buro when petitioner was appointed as an organizer of farm youth (TR 48, 23). During the years 1933-1934, he saw petitioner at from twenty-five to thirty closed meetings of the District Committee of the Communist Party (TR 22-23).

Nowell testified that he met petitioner in 1929 in the District Party office at a closed meeting to which only functionaries and others in strategic work were invited (TR 62, 63). He saw petitioner at at least one District convention (TR 64). During the years 1929-1931, he saw petitioner at twenty or twenty-five closed meetings of the Young Communist League (TR 64). He knew petitioner as a member of the District Committee of the League and a Buro organizer of the Labor Sports Union (TR 20, 65). During the years 1933-1936, Nowell saw petitioner present at, "conservatively", one hundred and fifty closed membership and functionary meetings of the Communist Party where he reported, discussed experiences, and received instructions (TR 67-68, 72). Nowell was a member of the District Buro at the time petitioner was assigned to do organizational farm work (TR 69-70). He often saw petitioner's name on the Party's membership rolls and had many conversations with him (TR 70-71).

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[1] The Young Communist League was described as a youth section of the Communist Party committed to the recruitment and training of youth for the movement and to agitation against war (TR 17, 66).

Petitioner offered no testimony in rebuttal but requested and was granted an adjournment to permit a study of the evidence (TR 108). When the hearing resumed on March 23, 1953 (TR 111), petitioner advised that he would rest on the record as it stood. He renewed a motion he had made at the outset of the hearing to quash the warrant as violative of the First and Fifth Amendments and Section 9 of Article 1 of the Constitution (TR 5, 111).

On June 4, 1953, the hearing officer concluded that petitioner was deportable, finding that he had been a voluntary member of the Young Communist League from 1929 to 1934 and of the Communist Party from 1933 to 1936. Before the Board of Immigration Appeals, petitioner urged bias on the part of the hearing officer.[2] The Board dismissed the appeal on August 19, 1953, holding that the findings and conclusions of the officer were based solely upon the record and upon substantial probative evidence.

2. After the decision of the Court of Appeals in this case on February 14, 1958, petitioner, on March 7, 1958, applied to the Board of Immigration Appeals for a reopening of his cause to permit him to introduce evidence which, he claimed, would show that his party membership was not meaningful. A copy of the motion is annexed as Appendix A, *infra*, pp. 9-13. On July 16, 1958, the Board of Immigration Appeals denied the application, setting forth its reasons in an opinion, a copy of which is set forth in Appendix B, *infra*, pp.

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[2] At the outset, petitioner had questioned the authority of the immigration officers to act (TR 6).

14-17.[3] The Board found that the evidence of record was sufficient to establish that petitioner's association with the Communist Party was meaningful, and also found that nothing had been submitted on behalf of petitioner to indicate that any change of decision was warranted. The Board noted that, under regulation 8 C.F.R. 6.21, a motion to reopen must be supported by affidavits or other evidentiary material. The motion filed by petitioner's counsel (see Appendix A, *infra*, pp. 9-13) contained no evidentiary material but merely a statement that petitioner would testify as to reasons for joining and remaining a member (*infra*, p. 11).

ARGUMENT

1. The record in this case shows petitioner to have been an active member of the Young Communist League and the Communist Party for seven years. He attended high level conferences and actively participated in recruiting young people and farmers for the Communist cause. See the Statement, *supra*; pp.

[3] Previously, on April 23, 1958, the Board of Immigration Appeals had denied the application to reopen on the ground that the record was not before it. After the petition for a writ of certiorari had been docketed in this Court, petitioner, with the consent of the government, applied to this Court for leave to withdraw the immigration record so that the reopening application could be considered on its merits by the Board of Immigration Appeals. On June 2, 1958, the Court granted the motion and provided that, if the decision of the Board was adverse to petitioner, the government's time to answer the petition for a writ of certiorari would be extended until 30 days after the decision. 356 U.S. 971. This brief in opposition to certiorari is being filed pursuant to that order.

2-3. This was clearly meaningful membership within the decisions of this Court in *Rowoldt* v. *Perfetto*, 355 U.S. 115, and *Galvan* v. *Press*, 347 U.S. 522, 528.

The petition for certiorari (filed on April 28, 1958) for the most part seeks to have the cause remanded to the immigration authorities to afford petitioner an opportunity to present evidence, particularly his own testimony, which he deliberately declined to produce at the original hearings, *supra*, p. 4. Petitioner has now had that opportunity to the extent that his application to reopen was considered by the Board of Immigration Appeals, but, as the Board properly found, he has failed to make a proper showing that he could negate the proof of voluntary and meaningful association established by this record. In his motion to the Board to reopen, petitioner merely stated that he would give testimony as to his "reasons and motives" in joining the Communist Party and remaining a member thereof, and his belief that there was no legal proscription against membership (see *infra*, p. 11).[4] But, aside from the cardinal fact that petitioner did not undertake to furnish an affidavit as to what such testimony would be or to give the details of the proffered testimony (as the regulations required), a mere statement of motive would not tend

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[4] Petitioner also offered to prove that he had not engaged in Communist activities for fifteen years prior to his arrest on the warrant of deportation. This is a factor which could be considered on an application for suspension of deportation, but does not render petitioner non-deportable under the statute. *Galvan* v. *Press*, 347 U.S. 522.

to show that he was not a voluntary member of a distinct and active political organization. As the court below pointed out, the *Rowoldt* case did not change the rule of *Galvan* v. *Press*, *supra*, that the government need not, under the statute, show that the alien knew of the advocacy of violent overthrow of the government by the Communist Party (see Pet. 19).

2. Petitioner also asks this Court to reconsider its decision in *Galvan* v. *Press*, 347 U.S. 522, as to the constitutionality of the statute providing for deportation of past Communist Party members, and the decision in *Marcello* v. *Bonds*, 349 U.S. 302, as to the constitutional validity of the procedure in deportation hearings. He offers no arguments which were not before the Court when those cases were decided and presents no new material warranting reconsideration.[5]

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[5] At its last Term, after the decision in the *Rowoldt* case, *supra*, the Court denied certiorari in cases challenging the constitutionality of the statute and asking for the overruling of *Galvan*. *United States ex rel. Avramovich* v. *Lehmann*, 355 U.S. 905; *Niukkanen* v. *Boyd*, 355 U.S. 905; see also *Jimenez* v. *Barber*, 355 U.S. 903; *Rystad* v. *Boyd*, 355 U.S. 912.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

AUGUST 1958.

APPENDIX A

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

MOTION TO REOPEN PROCEEDINGS

FILE NO. A 4564405—Detroit

IN RE: ARNOLD SCHLEICH, alias
JOSEPH RING,

IN DEPORTATION PROCEEDINGS.

TO THE BOARD OF IMMIGRATION APPEALS:

Petitioner, by his undersigned counsel, respectfully moves the Board to reopen the deportation proceedings against Petitioner. In support of this motion, Petitioner shows as follows:

1. Since the date of the final Order herein, and on February 14, 1958, the Court of Appeals for the Sixth Circuit has affirmed the Order of Deportation.

2. Petitioner has filed with the Circuit Court of Appeals for the Sixth Circuit a petition for stay of execution of the judgment pending filing of a petition for a writ of certiorari to the Supreme Court of the United States.

3. Petitioner believes that his case presents substantial issues which merit consideration by the Supreme Court of the United States including the following:

I. In the light of the standard of proof imposed upon the Immigration Service by the decision of the Supreme Court in *Rowoldt*, supra, can it be said, upon the record here, that the proofs presented by the Service on the question of the character of Petitioner's alleged Communist Party membership, measure up to that standard?

II. Whether, notwithstanding the decision of the Supreme Court in *Galvan*, supra, the statute providing for deportation of aliens for past membership in the Communist Party is unconstitutional on its face or as applied to the facts in this case?

III. Does not the Fifth Amendment's requirement of due process demand that, at a minimum, Petitioner's case be remanded to the Service with leave to Petitioner to present evidence bringing his alleged membership within the boundaries of the *Rowoldt* opinion?

4. Petitioner has also recently learned of the recent decision of the Board of Immigration Appeals made on January 3, 1958, in the matter of *G.*, File No. A 524774, wherein the Board said:

> ". . . the case was tried prior to the decision of the Supreme Court in *Rowoldt v. Perfetto*, . . . revealing that proof of voluntary membership in the Communist Part cannot create liability to deportation unless it is accompanied with proof that the affiliation of the alien member was with political implications. The necessity for the existence of political implications was not clear to administrative authorities prior to this decision. . . . No attempt was made to establish this factor at the instant hearings. . . . We shall therefore, order reopening of the proceedings so that the nature of the respondent's membership may be established."

5. Petitioner submits that the rationale of the Board's holding in the matter of G, require that his proceedings be reopened to permit him to offer proof negating any inference of "political implications" based upon the evidence here that he was an organ-

izer, attended high level conferences with District Officers of the Party, and attended closed meetings of the Party. This is the total of the Service's evidence concerning the character of the Petitioner's membership in the Party. Surely, if the Service is entitled to reopen because of a misapprehension of what it was required to prove, then Petitioner, laboring under the same misapprehension, is entitled to reopen for the purpose of disproving or explaining the above evidence and negating any inferences based thereon.

And if this is to be done it would appear more appropriate that this should be done before Petitioner is required to appeal to the Supreme Court.

6. At a reopened hearing, Petitioner would show and now offers to show the following facts, raising issues not heretofore considered by this Board. Petitioner will show that:

(a) In joining and remaining a member of the Communist Party, Petitioner did so under the mistaken belief, held by him in good faith, that there was no legal proscription against such membership;

(b) Prior to the time of his arrest by the Immigration Service in July, 1952, Petitioner had voluntarily discontinued all membership or affiliation with the Communist Party and he has not engaged in any Communist Party activity for more than fifteen years;

(c) The reasons and motives of the Petitioner in seeking membership in the Party and for remaining such a member. Such evidence to be given by the Petitioner himself.

7. Assuming the above evidence (which Petitioner would have presented, but for his misapprehension as to the requirements now set forth in *Rowoldt*), the

administrative authorities here are required to determine in the first instance:

(a) Does the record, as thus supplemented by the above additional facts, establish by a "solidity of proof" that Petitioner voluntarily joined or committed himself to the Communist Party and with consciousness that he was doing so?

(b) Where, as here, an alien joins and maintains membership in the Communist Party is there any substantial basis for a finding that such membership was of the character proscribed by the deportation statute as interpreted in *Rowoldt*, supra?

WHEREFORE, Petitioner requests that his deportation proceedings be reopened for the above purposes and that he be permitted to testify concerning the matters described above.

Respectfully submitted

BERNARD J. FIEGER
Attorney for Petitioner
1256 National Bank Building (26)
WOodward 1-0737

Dated: Detroit, Michigan.

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

ARNOLD SCHLEICH, being duly sworn, deposes and says that he is the Petitioner herein; that he has read the foregoing Motion to Reopen Proceedings and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein

stated to be on information and belief, and as to those matters, he believes it to be true.

ARNOLD SCHLEICH

Subscribed and sworn to before me
this day of March, A.D. 1958.

Julie Ann Lesnoff

Notary Public, Wayne County, Mich.
My Commission Expires Apr. 13, 1958

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals
July 16, 1958

File: A-4564405—Detroit

In re: ARNOLD SCHLEICH alias JOSEPH RING

IN DEPORTATION PROCEEDINGS
MOTION
ON BEHALF OF RESPONDENT:

BERNARD J. FIEGER, Esquire
1256 National Bank Building
Detroit 26, Michigan

CHARGES:

Warrant: Act of 1918—After entry, member of Communist Party of the United States (137, 8 USC)

Act of 1918—After entry, member of a section, subsidiary, branch, affiliate, or subdivision of the Communist Party of the United States, to wit: The Young Communist League (137, 8 USC)

Lodged: None

APPLICATION: Reopening

This case is before the Board pursuant to counsel's motion received at the Detroit, Michigan office of the Service on March 7, 1958 requesting that the outstanding order and warrant of deportation be withdrawn and further requesting reconsideration and reopening of the proceedings for the purpose of de-

termining the nature of the respondent's membership in the Communist Party of the United States in light of the decision of the Supreme Court in *Rowoldt* v. *Perfetto*, 355 U.S. 115. This case was before this Board on August 19, 1953, at which time we dismissed the appeal from the order entered by the special inquiry officer directing that the respondent be deported from the United States pursuant to law on the grounds set forth above.

The respondent, a 54-year-old male, native and last a citizen of Germany, has resided continuously in the United States since his admission for permanent residence at New York, New York on June 7, 1923. The record reflects that the respondent was an affiliate of the Communist Party, to wit, the Young Communist League from 1929 to 1934 and that he was a voluntary member of the Communist Party of the United States from 1933 to the end of 1936. He has been found and is subject to deportation on the grounds designated above. It is not deemed necessary to discuss in detail the remaining facts in this case, inasmuch as they have been heretofore fully covered by the special inquiry officer and this Board in their respective decisions of June 4 and August 19, 1953.

The respondent's motion seeking reopening and reconsideration is predicated upon the decision of the Supreme Court in *Rowoldt* v. *Perfetto*, 355 U.S. 115 decided on December 9, 1957. The precise issue present in the respondent's case was before the Court of Appeals for the Sixth Circuit on February 14, 1958, at which time the court considered and rejected the several contentions advanced by counsel on motion (252 F. 2d, 191).

There are so many distinguishing factors between the instant case and the Rowoldt case, supra, that the latter case has no application. The record reflects that

respondent was a voluntary member of the Young Communist League from 1929 to 1934. Likewise, he was a voluntary member of the Communist Party of the United States from 1933 to 1936. The respondent's association with and participation in the communist movement in the United States lasted for a period of at least seven years. Moreover, two witnesses testified as to the respondent's membership in the Communist Party of the United States and the Young Communist League and as to his active participation in the program of the aforementioned organizations. In the Rowoldt case, the alien was a member of the Communist Party for less than a year. It appears that he joined the Communist Party to get something to eat as well as clothes and shelter. The court in *Rowoldt* v. *Perfetto* concluded that Rowoldt's membership in the Communist Party may have been devoid of any political implications and that there was absent a "meaningful association." Moreover, *Rowoldt* v. *Perfetto* did not change the law with respect to the proof necessary to show membership in the Communist Party. *Galvan* v. *Press*, 347 U.S. 522 is recognized as the controlling authority. In the latter case the court held that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. The court said that "it is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as the distinct and active political organization, and that he did so of his own free will."

The evidence present in the instant case is sufficient to establish a "meaningful association" by the respondent with the Communist Party of the United States and to show that he joined the Communist

Party, aware that he was joining an organization known as the Communist Party, which operated as a distinct and active political organization, and that he did so of his own free will. A motion to reopen must be supported by affidavits or other evidentiary material as well as setting forth the facts to be proved at the reopened hearing (8 CFR 6.21). Nothing has been submitted on behalf of the respondent to indicate that any change in the Board's prior decision is warranted. We have carefully considered all the evidence of record together with counsel's representations on motion and as a consequence thereof we find that the evidence of record is sufficient to establish a "meaningful association" by the respondent with the Communist Party of the United States and that such association was established by reasonable, substantial and probative evidence. For the reasons stated, the following order will be entered.

ORDER: It is ordered that the motion be denied.

Chairman